No. 96-12 (2)

Supreme Court, U.S.
FILED
AUG 1 1996
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In The

Supreme Court of the United States

October Term, 1995

ILENE THURMAN HUNTER, on behalf of KATHY MICHELLE HUNTER, CLAUDE KENNETH HUNTER, JR., MICHAEL CHRISTOPHER HUNTER, MELISSA ILENE HUNTER and DONOVAN BLAINE HUNTER,

Petitioners,

vs.

KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD. (a Subsidiary of DRACO GROUP OF COMPANIES, LTD.) and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Respondents,

vs.

FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 14(B) STATEMENT AND RULE 29.6 STATEMENT

All parties in the Court of Appeals are listed in the caption of this case. Respondent, Knoll Rig and Equipment Manufacturing Company, Ltd. (KREMCO) was formerly a subsidiary of Dreco* Group of Companies, Ltd.; however, KREMCO recently merged with Dreco, Inc., a Texas corporation. Dreco, Inc. is a wholly owned subsidiary of Dreco Energy Services, Ltd., a Canadian corporation. KREMCO had no subsidiaries.

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania is a subsidiary of American International Group, Inc. The following are non-wholly owned subsidiaries of National Union Fire Insurance Company of Pittsburgh, Pennsylvania: AIG Europe, S.A.; Eurinvest Finance, S.A.; AIG Realty, Inc.; AIU Insurance Company; American International Insurance Company; Tokyo Private Emergency Center K.K.; American International Specialty Lines Insurance Company; American International Underwriters Overseas Association; Pacific Ocean Leasing; Winkle Enterprises; Lexington Insurance Company; J.I. Accident & Fire Insurance Company, Ltd.; United Guaranty Corporation; and United Guaranty Residential Insurance Company.

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* Petitioners have erroneously referred to Dreco as "Draco" in their application.

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REASONS FOR DENYING THE WRIT

A. Federal Law Issues

This is a case involving the state law of Louisiana, based upon the Louisiana Products Liability Act (hereafter, LPLA), LSA R.S. 9:2800.51, *et seq.* Originally filed in state court, the case was thereafter removed by respondent herein, KREMCO, pursuant to diversity jurisdiction.

In their writ application to this Court, the petitioners have provided a description of the accident which forms the basis of the litigation, that occurrence being an oilfield accident which happened on August 29, 1990. Without repeating that description in its entirety, the accident occurred as a result of oilfield pipe being "leaned" in the wrong direction while being "racked" into the racking board of the rig originally manufactured by KREMCO (significant changes had been made by others to the product, but these are outside the scope of the issues now before this Court).

Due to the improper and uncorrected lean of the pipe, KREMCO's primary defense to the case has always been based upon an assertion that the product was not being subjected to a "reasonably anticipated use" as required under the LPLA. Every discovery deposition taken in the case which pertained to the matters of liability (some of which were introduced as evidence at trial) involved extensive questioning on this issue, and every liability witness who appeared live at trial was examined and cross-examined as to same.

Respondent is fully confident petitioners would agree that the crux of KREMCO'S defense was based upon the improper and uncorrected lean of the pipe as being a "use" which could not have been "reasonably anticipated" under the LPLA. Indeed,

petitioners so stated during the trial itself — at page 857 of the transcript (A. 12a), in response to an objection made by counsel for respondent to attempted rebuttal testimony from one of petitioners' own witnesses, counsel for petitioners asserted that, "Your Honor, the defendants have been — *that's all their case has been on defense, has been the lean of the pipe"* (emphasis added). Significantly, the Fifth Circuit Court of Appeals reversed in favor of KREMCO based solely upon a finding that the uncorrected lean of the pipe was a "gross and unusual" handling of the product and could thus not be reasonably anticipated (*see* Fifth Circuit original panel opinion and opinion denying rehearing). The full import of this admission by petitioners as to the nature of respondent's defense in the trial court will be shown *infra*.

Apparently as an afterthought, petitioners have raised in their writ application to this Honorable Court, and *for the first time ever in these proceedings,*[1] an alleged violation of Federal Rule of Civil Procedure 50. Specifically, petitioners allege that respondents, in the trial court, failed to state on the record that the ground for their motions for judgment as a matter of law was insufficient evidence of "reasonably anticipated use". Petitioners maintain that under Rule 50(a)(2), this should have precluded the Fifth Circuit Court of Appeals from reviewing and reversing the jury verdict based upon the sufficiency of the evidence.

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1. Petitioners did attempt to bring this issue to the attention of the Fifth Circuit *after rehearing had been denied.* That court declined to file such pleadings, responding to petitioners' counsel that it had already ruled and would thus take no further action.

Based upon FRAP 28(a)(3) and (a)(6), it has been held that any issues not briefed or argued in the appellate court are waived; *See Yohey v. Collins,* 985 F.2d 222, 225 (5th Cir. 1993). As such, and for the other reasons set forth in this brief, this Court should likewise consider the matter waived and deny petitioners' writ application.

Although petitioners admit that they never raised these issues in the courts below, they cite *absolutely no authority whatsoever* which would allow such to be raised for the first time in this Court. Additionally, petitioners do not assert that they would or could have done anything differently in the trial court regardless of the Rule 50 issue they now assert.

At the outset, Supreme Court Rule 10, which provides that writs of certiorari will be granted "only for compelling reasons", should also be mentioned. While respondent acknowledge that this Rule is non-exclusive in nature, it should be noted that the present dispute does not fall within the listed parameters. Thus, no "compelling reasons" are presented which should warrant review by this Court.

Returning to the aforementioned indication that petitioners have never before complained of any non-compliance with Rule 50, it is important to note that they have had *multiple opportunities* to do so, as follows: (1) during the trial itself; (2) in response to respondent's written post-trial judgment as a matter of law presented to the trial court; (3) in response to respondent's appeal to the Fifth Circuit; (4) in oral argument to the Fifth Circuit; (5) as part of either their petition for rehearing, or their suggestion for rehearing en banc, in the Fifth Circuit. If petitioners truly felt that their constitutional rights were being ignored or adversely affected, or if they truly felt that the Fifth Circuit was "without power" to review the issues asserted by respondent on appeal, they most assuredly would have loudly protested below.

Not only did petitioners make no such protest, they have at all times continued to assert the that the evidence adduced at trial *was sufficient* to support the issues they felt were favorable to them, *including* the issue of reasonably anticipated use. In addition to numerous arguments made supporting the

sufficiency of the evidence itself, petitioners previously set out, at page 11 of their reply brief in the Fifth Circuit, what they asserted to be the appropriate standard of review in this matter:

> The proper standard for reviewing a jury verdict was recently stated by [the Fifth Circuit] in *Prestenbach v. Rains*, 4 F.3d 358 (5th Cir. 1993). . . .

The court in *Prestenbach* stated and applied the standard of review set forth in *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) which is the "sufficiency of the evidence" standard. Significantly, the majority in *the Fifth Circuit applied exactly this standard of review, just as petitioners had requested* (see panel opinion in this matter, 70 F.3d 803 at page 808, citing *Boeing, supra)*. Obviously, therefore, petitioners have already conceded that this case is properly controlled by, and was properly reviewed at the Fifth Circuit by, the standard of "sufficiency of the evidence".

Based upon the foregoing alone, respondents assert that petitioners have waived any right they may have had to now assert a Rule 50 issue. Out of an abundance of caution, however, further explanation will be provided to show that their position is not well-founded in fact or in law.

Specifically, petitioners' newly-created issue is based upon the assertion that respondents did not assign reasons for their motions for judgment as a matter of law in open court, said motions having been made at the close of petitioners' case and at the close of all the evidence. The grounds they have set forth, however, are entirely transparent and, in fact, self-contradictory. While it is true that reasons were not orally stated by respondents "on the record" simultaneously with the motions, this is not dispositive under the circumstances of this particular case and,

indeed, respondents are perplexed by the nature of the petitioners' argument.

The primary purpose in stating reasons for Rule 50 motions is to prevent "ambush", and to make one's opponent aware of any defects in his case so that he will have an opportunity to cure same prior to submission to the jury; *see Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979). Thus, it follows that if one's opponent is indeed advised of grounds for the motion, whether in open court or not, or if he is otherwise aware of such, both the purpose and spirit of the rule have been fulfilled.

The above is why respondents are perplexed — *petitioners have additionally admitted that, at the close of their case and at the close of all the evidence in the trial court, they were indeed aware of the bases for respondent's motions.* In their Suggestion for Rehearing En Banc to the Fifth Circuit Court of Appeal, at page 3, petitioners made the following statement:

> At the close of the Plaintiffs' case, and after all evidence had been admitted, KREMCO moved for judgment as a matter of law *contending that Hunter's death was not caused during a "reasonably anticipated use" of the racking board, and that the racking board was not unreasonably dangerous.* Each motion was denied by the Magistrate. (emphasis added)

One must therefore wonder how a complaint can now be validly made that they did not possess such knowledge at the times indicated —if that knowledge was not obtained from respondents, from whom was it obtained?

Although not crucial to a resolution of this issue for reasons which will be explained later in this brief, the transcript of the proceedings in the trial court shows that, at the close of the petitioners' case, counsel for respondents requested a conference with the trial judge, Magistrate Judge Roy Payne (who presided pursuant to the parties' prior consent), and that such a conference was indeed held off the record during a recess (Tr. beginning at page 528; A. 6a). This conference was brief, but several matters were discussed, both on behalf of plaintiffs and KREMCO, including the motions at issue and some evidentiary matters. Judge Payne's comments at that time indicated to respondents that he was not inclined to grant any motions which would take issues away from the jury.

That motions for judgment as a matter of law were indeed discussed during this recess is obvious from page 532 (A. 10a) of the transcript — after discussing some evidentiary matters pertaining to one of plaintiffs' exhibits, the Court inquired of counsel for respondents, without having to be reminded, in the following manner:

> THE COURT: YOU HAD MADE REFERENCE, MR. RANEY, TO SOME MOTION, I BELIEVE, THAT YOU WANTED TO MAKE AT THE NEXT RECESS. THIS IS THE NEXT RECESS.
>
> MR. RANEY: YES, SIR, WE WOULD MOVE TO DISMISS AT THIS TIME ON A DIRECTED VERDICT, YOUR HONOR.
>
> THE COURT: ALL RIGHT, I'LL CONSIDER THAT MOTION AS HAVING BEEN MADE AN DENIED, AND WE WILL BE IN RECESS FOR THE NEXT 20

MINUTES TO ALLOW YOU TO PREPARE FOR YOUR CASE IN CHIEF.

Indeed, *counsel for petitioners have never stated to this Court that they were not aware of the reasons underlying the motions*— as above, their only present complaint appears to be strictly technical in nature, *i.e.*, that such reasons were not stated "on the record".[2]

True to what had been indicated by the trial judge, he denied the motion perfunctorily — neither he nor counsel for petitioners requested any further discussion or explanation in open court. Significantly, however, *Judge Payne considered the motion as "having been made"* — there was no indication that the motion was defective because reasons were not assigned, nor did counsel for petitioners indicate any confusion as to the basis for such.

At the close of all the evidence, respondents indicated that they wished to re-urge their prior motion. Rather than giving full consideration to the motion at that juncture, however, the trial court again dealt with the matter perfunctorily by merely stating, "The motion for judgment as a matter of law will be noted and denied at this time" (Tr. 891; A. 13a).

Subsequently, respondents filed a written post-trial motion for judgment as a matter of law. The entirety of the foregoing is thus in complete accord with Rule 50(b), which states that if the motion at the close of all the evidence is not granted for any

2. In their untimely submission to the Fifth Circuit after denial of rehearing (*see* footnote 1 above), petitioners did suggest that they were unaware of such underlying reasons. Notably, this suggestion has been deleted from their application to this Court — it can only be assumed that, in the interim, petitioners have more carefully reviewed their Fifth Circuit brief, wherein they admit that they were in fact aware of those grounds. The relevant portion of that brief has been reproduced in the text of this writ opposition.

reason, the court is "considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion".

Moreover, it is patently clear from a reading of the panel opinion of the Fifth Circuit that the record in this case was carefully scrutinized by both the majority and the dissenting judge. Obviously, the Fifth Circuit saw no Rule 50 problem in the record —the court either concluded that there had been compliance with Rule 50, or that any noncompliance was merely "technical" in nature and thus excused such due to the circumstances in which the motions for judgment as a matter of law were made or the manner in which they were handled by the trial judge, or that the right to complain about any violation of Rule 50 had been waived because of petitioners' failure to assert same.[3]

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3. Along with other courts, the Fifth Circuit has acknowledged that Rule 50 is a "strict one"; however, it has taken a "liberal view" of what constitutes a valid motion under that rule. *See Quinn, supra,* 597 F.2d at 1025.

In *Hall v. Savings of America,* 68 F.3d 470 (5th Cir. 1995)(unpublished), *cert. denied,* __U.S.__, 116 S. Ct. 1265, 134 L. Ed. 2d 213 (1996), as in other Fifth Circuit cases, technical noncompliance with Rule 50 has been excused where, for example, the trial judge "cuts off" counsel while moving for judgment as a matter of law or otherwise makes it clear that a detailed explanation of the reasons for the motion would not be welcomed or required by the Court. In the instant case, the record reveals that the trial judge dealt with KREMCO's motion summarily by stating that he "consider[ed] that motion as having been made and denied," without asking for a response from plaintiffs' counsel or otherwise truly "hearing" the motion. Any noncompliance was therefore at least somewhat invited and thus excused, as the Fifth Circuit could surely have concluded.

See also Merwine v. Bd. of Trustees, 754 F.2d 631 (5th Cir. 1985), and *Bohrer v. Haines Corp.,* 715 F.2d 213 (5th Cir. 1983), *cert. denied,* 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984), illustrating that noncompliance with Rule 50 can be excused.

Had the Fifth Circuit been concerned about a Rule 50 problem, the panel certainly would have raised it *sua sponte* at oral argument or dealt with it in the opinion. At the very least, the dissenting judge would have directly and succinctly pointed this out in his dissent.

In *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), this Court dealt with similar Rule 50 issues (specifically, new trial) in the context of waiver. *Neely* will be discussed in greater detail *infra*, but in conjunction with the above, it is noteworthy that even though this Court considered it "incumbent on the Court of Appeals to consider the new trial question in light of its own experience with the case", the Court further stated that:

> . . . we will not assume that the court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question. [386 U.S.at 330, 18 L.Ed.2d at 85].

Likewise, this Court should not assume that the Fifth Circuit ignored its duty under the circumstances presented in the instant matter.

Insofar as discussion between the trial court and counsel, the subject of "reasonably anticipated use" did not come up again until near the close of the trial during the final jury charge conference, when *counsel for plaintiffs/petitioners stated that the issue of "reasonably anticipated use" should not be a jury issue.* This discourse appears at page 765 (A. 11a) of the transcript, the significant portion of which is as follows:

> Mr. Royer: . . .First and foremost, we believe that *it's a matter of law* for Your Honor that there are no facts over which

> reasonable minds could differ that they were involved in a reasonably anticipated use of this product at the time; therefore, *it is our position that the reasonably anticipated use issue should not be tendered to the jury,* and I'll cite to Your Honor—defendants had cited Lockart versus Kolb [sic] Steel. . . . [emphasis added].

Petitioners' counsel then went on to argue that *Lockart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864 (5th Cir. 1993), upon which respondents have always placed primary reliance and upon which the Fifth Circuit relied heavily for its reversal, is "entirely different" from the factual situation at hand. Arguably, the above quoted statement by petitioners rose to the level of an express waiver, and should be viewed as consent to remove this issue from the province of the jury.[4]

Of course, the Court had already indicated on one occasion, as noted above, that all such issues would be given to the jury, and had ruled in conformity therewith at the close of plaintiffs' case. At the close of all the evidence, however, defendants-respondents re-urged their prior motion, and again, same was perfunctorily denied by the magistrate judge. However, at page 891-892; A.14a) of the transcript, plaintiffs' counsel spoke up to nevertheless provide further argument:

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4. *See and compare Zaks v. Elliott,* 106 F.2d 425, 427 (4th Cir. 1939), an early Rule 50 case. In *Zaks,* defendant had moved for a directed verdict, and the court stated that plaintiffs "were likewise anxious to have the case decided as a question of law by the court". Accordingly, the appellate court treated the case as one in which the parties had agreed not to have a jury.

Although *Zaks* dealt with a situation where the entire case was withdrawn from the jury, its rationale should be equally applicable to the question of whether particular issues can be withdrawn from the jury as questions of law, thus obviating any Seventh Amendment protection.

> Mr. Posey: . . . And also, as to the issue of reasonably anticipated use, it's our contention still that is not within what is contemplated by the law. The facts of this case clearly constitute a reasonably anticipated use of this product and, therefore, that particular instruction should be given to the jury.

In keeping with his prior indication that no such motions would be granted, the Court denied this motion as well.

The above discourse nevertheless shows that petitioners continued to assert that "reasonably anticipated use" was *not* a jury issue, to the extent of requesting that the Court directly charge the jury that the "use" of Kremco's product was, as a matter of law, "reasonably anticipated". For petitioners to now claim that their constitutional rights have been infringed — an argument which must necessarily be based upon the self-contradictory acknowledgment that the Fifth Circuit *agreed* with them that this was not a jury issue —is unimaginable.

As stated above, respondents renewed their motions made during the trial by filing a written motion after the jury verdict in accord with FRCP 50(b). With respect to the issue of reasonably anticipated use, primary reliance was based upon *Lockart, supra*, and *Daigle v. Audi of America, Inc.*, 598 So.2d 1304 (La. App. 3d Cir. 1992) — *the same cases previously set forth in proposed jury instructions and argued in discussions with the magistrate judge during trial.*

Quite significantly, *at no time in responding to that written motion did petitioners raise a Rule 50 problem.* It is thus asserted that when petitioners failed to object to the filing of this motion and/or to raise a Rule 50 issue at that time, they waived their right to do so thereafter — even if the prior oral motions could have

been considered defective, which is denied, or even if no off-the-record conference with the trial judge had occurred, the defect was thus cured; *see Whelan v. Abell,* discussed *infra.*

Of course, the trial judge evaluated this post-trial written motion and, as he had done during trial, denied same. This is important, however, since his action in doing so leads to an inevitable conclusion — *even if additional detailed argument had been made by respondents "in open court", the motion would still have been denied. In other words, it is clear that no "reasons" provided to the trial judge at any time were going to change his mind on this issue.*

Also very significant is that *at no time* — not during trial, nor in response to the written post-trial motion, nor in the Fifth Circuit (even on request for rehearing), and tellingly, *not even in their writ application to this Court* — have petitioners even attempted to assert that the failure of respondent to state Rule 50 reasons "in open court" would have caused them to change or add to anything which occurred during the trial. The explanation for this is, of course, simple — nothing could have been changed anyway, because *the vast majority of the evidence developed by respondents on the issue of "reasonably anticipated use" was accomplished through cross-examination of petitioners' own witnesses.*

Each and every one of Mr. Hunter's co-employees testified that the "use" of KREMCO's product on the day of the accident was known by the crew, including Mr. Hunter, to be dangerous, unnecessary, and against industry practice, and petitioners' own expert, Ken Kaigler, stated that such was "not a common thing" (the pertinent testimony of these witnesses is contained in footnotes in the original Fifth Circuit opinion). In other words, because their own witnesses had testified against them on this issue, there was nothing else petitioners could have done to "cure any defects" in their case.

In accord with the foregoing, it is also important to note that petitioners never made any request for a new trial in the lower courts.[5] If they felt that they had been "surprised" or "ambushed" by the motions for judgment as a matter of law and needed to "cure defects" in their case, the time to assert such would have been in response to respondent's written post-trial motion in the trial court or at some point in the Fifth Circuit — yet they never did so, *even when applying for rehearing in that court, and have not done so in their writ application to this Court.*

Undeniably, petitioners' failure to request a new trial clearly shows their acknowledgement that there was no "ambush", and that no new evidence could have been adduced in support of the issue of "reasonably anticipated use". In turn, this provides a further basis supporting their waiver of any supposed Rule 50 problems.

That the right to a jury trial can be waived is axiomatic. Although this Court's opinions in *Slocum v. New York L. Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523 (1913), and *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 55 S.Ct. 890 (1935),[6] are pre-Rule 50 cases, both stand for the proposition that the right to a trial by jury as provided by the Seventh Amendment can be waived, either expressly or impliedly (*see, e.g.*, 295 U.S. at 657, 55 S. Ct. at 891). Thus, if the right to a jury can itself be waived, it is also axiomatic that compliance with Rule 50 can be waived as well.

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5. Nor did petitioners, in accord with Rule 50(d), assert any grounds, as appellee in the circuit court, entitling them to new trial.

6. Rule 50(b) as originally drafted was apparently implemented in direct response to the holding in *Baltimore & Carolina Line*, and made clear that when a motion for directed verdict was not granted, the court was deemed to have submitted the case to the jury subject to the court's later deciding the legal questions raised by the motion; thus, the Seventh Amendment was not implicated because the case was only provisionally given to the jury. This is what occurred in the present matter.

Indeed, later cases which have specifically dealt with Rule 50 problems have held that Rule 50 does *not* implicate the Seventh Amendment; *see Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189 (1940). Although petitioners cite extensively to *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947), and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177 (1948), as supposed support for their position, neither of those decisions even mention the Seventh Amendment. Both *Cone* and *Globe Liquor* dealt with situations in which the alleged Rule 50 violation was a failure to move for judgment notwithstanding the verdict (JNOV), and in which the issue was whether the appellate court could reverse and render judgment or whether it was limited to remanding for a new trial; both held the latter. That is not the issue in the present case — moreover, at no time have petitioners herein requested a new trial, nor have they asserted any grounds for same. *See Neely, supra.*

A brief review of the underlying rationale in the above cases, however, provides an interesting comparison to the present context. In *Cone*, for example, this Court indicated that the importance of making a required motion in the trial court relates to the need for an initial determination by the trial judge since he is the one who "saw and heard the witnesses and has the feel of the case" (330 U.S. 216, 67 S. Ct. at 755). Significantly, *that very scenario has already occurred in the present matter* — respondents' motions for judgment as a matter of law made during trial were renewed in their written post-trial motion, and the trial judge was thus called upon to review the evidence and rule accordingly. The rationale underlying *Cone* and *Globe Liquor*, both of which involved situations in which no JNOV had been made in the trial court, was thus fulfilled; additionally, *petitioners herein made no objection to that written motion, nor did they raise any Rule 50 problem in response.*[7]

7. Aside from *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.

(Cont'd)

The first case from this Court to actually analyze a situation involving waiver in the context of Rule 50 was *Neely, supra.* In that matter, the jury had rendered a verdict in favor of plaintiff, and the trial judge had denied the defendant's motion for JNOV; plaintiff appealed, but did not request or present grounds for a new trial in the event the verdict was not upheld. When the appellate court reversed in favor of defendant, plaintiff submitted a writ which, as in the present matter, asserted only that the appellate court had been without such power and that the verdict of the jury should be upheld.

This Court in *Neely* held that Rule 50(b) does not violate the Seventh Amendment, and that since there is no greater restriction on the province of the jury when an appellate court grants a JNOV than when it is granted by a trial court, there is no constitutional bar to such action by the appellate court. Additionally, and in striking similarity to the case at hand, it was noted that the petitioner, as appellee in that matter, had not suggested any grounds for a new trial in the event of reversal, had not requested a rehearing in the appellate court[8], did not suggest that the record was insufficient to present any new trial issues, and did not suggest any other reason that the case should have been remanded.

Although the petitioner in *Neely* finally suggested, in her

(Cont'd)

Ed. 1188 (1938), and its progeny, the only other United States Supreme Court case cited by petitioners is *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Apparently in an attempt to gain this Court's attention, petitioners give *Anderson* pre-eminent importance in the heading of Section B, page 14, of their writ application — simply stated, *Anderson* was based upon a motion for summary judgment and is thus wholly inapplicable to the case at hand.

8. As previously noted, petitioners in the present matter did request a rehearing in the Fifth Circuit; however, they did not raise a Rule 50 problem at that time.

brief to this Court, that she had a valid ground for a new trial (386 U.S. at 330, 18 L.Ed.2d at 85), the Court stated as follows:

> This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari. . . . Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40(1)(d)(2).
>
> Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and therefore affirm.

A similar result should thus be reached in the present matter, where petitioners have never at any time asserted that a new trial would have served any purpose.

In the instant case, the petitioners have never asserted that any such shortcomings existed in their proof, and in fact, have *asserted exactly the opposite* as to the issue of reasonably anticipated use. *If such a defect was felt to exist in their case, they would not have asserted to the Court that this issue should have been taken away from the jury,* and they would certainly have asserted the need for additional evidence when opposing defendants-respondents' written post-trial motion. Even after reversal and entry of judgment in favor of defendants-respondents in the Fifth Circuit, petitioners made no request for a new trial, nor did they otherwise even suggest that any additional proof would have changed the result. Indeed, they have not made any such suggestion in their writ application to this Court.

Turning to circuit court decisions, space limitations do not allow in-depth discussion of all of the cases cited by petitioners. However, at the outset, it should be noted that in *all* of those decisions, Rule 50 problems had been asserted in the circuit court or had already been raised in the trial court, *not* for the first time in this Court.

Most of the cases referenced by petitioners are quite old and/or simply do not involve situations similar to the present matter.[9] For example, petitioners cite *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 (3d Cir. 1992), which in turn relied upon *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3d Cir. 1983). In *Acosta*, counsel had apparently moved for directed verdict in an off-the-record conference at the close of plaintiff's case. At the close of all the evidence, counsel attempted to renew that earlier motion, but did not adequately state the grounds.

The Third Circuit stated that, standing alone, the latter motion might not have served as a valid prerequisite to a motion for JNOV; however, the court concluded that the "communicative content", "specificity", and "notice-giving" requirement of Rule 50 should be *judged in context* (717 F.2d at 832), and that under the particular circumstances of that case, counsel and the district court clearly understood the grounds for the motion even if such had not been appropriately uttered. Likewise, in *Fineman* itself, the Third Circuit found no violation of Rule 50, and notably, adequacy of the JNOV had been challenged even at the district court level.

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9. Petitioners cite *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir. 1988), for the proposition that grounds must be stated for a Rule 50 motion in order to preserve such for appellate review. *Hinojosa*, however, had nothing whatsoever to do with whether grounds had been stated; rather, in that case, no Rule 50 motion had been made at all.

In *Jones Truck Lines, Inc. v. Argo*, 237 F.2d 649 (8th Cir. 1956), and in *Friedman v. Decatur Corp.*, 135 F.2d 812 (D.C. Cir. 1943), the courts found that the Rule 50 motions were defective, but also concluded that, under a sufficiency of the evidence standard, the motions had been properly denied.

Other recent appellate court cases have made it clear that where a party conducts itself as have petitioners in the present matter, a waiver of non-compliance under Rule 50 occurs. The latest decision located by respondents on these issues is *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995).[10]

In *Whelan*, the plaintiff had been granted judgment, but the defendant, in a renewed motion for JNOV after trial, asserted for the first time that the *Noerr-Pennington* doctrine barred plaintiff's recovery. This motion was granted by the trial judge, and plaintiff complained on appeal that the doctrine had not been part of defendant's pre-verdict motion. Although plaintiff admitted that this complaint had not been made before, he asserted that the issue was "jurisdictional" in nature and could therefore be raised at any time.

The D.C. Circuit *rejected* the argument that such Rule 50 matters are jurisdictional[11] and, citing *Slocum* and others, *supra*, squarely held that such complaints of Rule 50 non-compliance are clearly waivable (48 F.3d at 1251-1253). Having established that point as a threshold matter, the court went on to hold that, when plaintiff made no objection to the additional grounds upon which defendant's post-verdict motion was based, such constituted a waiver of the right to complain thereafter.

Whelan is directly applicable to the present case on at least two points. These can be stated briefly as follows.

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10. The result in *Whelan* should be compared with an earlier case from the D. C. Circuit cited by petitioners, *Friedman*; *see* n. 9. Obviously, the factual situation in *Whelan* was completely different and much more compelling, as are the facts of the present matter.

11. Likewise, the court in *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1939), expressly stated that, "We doubtless have the power to consider such motion even though the grounds be not stated. . . ."

The above matter was cited by petitioners for the proposition that an appellate court has *no power* to review when Rule 50 has not been followed. Therefore, the case does not stand for the proposition stated by petitioners.

First, petitioners in the instant case made no objection to respondent's written motion for judgment as a matter of law which was filed post-verdict in the trial court. Therefore, even if it could be said that respondent's prior motions made during trial were defective, which is denied, the "additional" grounds contained in the post-verdict motion were added.

Second, the Fifth Circuit in the present matter *granted* the motion for judgment as a matter of law, and thereafter, petitioners failed to make any complaint about alleged Rule 50 violations *even though such could easily have been asserted as part of their petition for rehearing or suggestion for rehearing en banc.* The only difference from *Whelan,* although of no moment, is that in *Whelan,* the motion had been granted by the district court.

For additional cases similar to *Whelan, see Collins v. Illinois,* 830 F.2d 692, 698 (7th Cir. 1987)(defendants did not challenge in the district court, at the time plaintiff moved for JNOV, plaintiff's failure to move for directed verdict, and it was held that this issue could not be raised for the first time on appeal); and *Cox v. City of Freeman, Missouri,* 321 F.2d 887, 891 (8th Cir. 1963)(holding that a directed verdict does not deprive the plaintiff of Seventh Amendment rights; that a constitutional issue not asserted below could not be raised at the appellate level; and that an adverse party who does not object at trial to his opponent's failure to state specific grounds for a Rule 50 motion will not be heard to do so on appeal).

See also Halsell v. Kimberly-Clark Corporation, 683 F.2d 285 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205, 103 S. Ct. 1194, 75 L. Ed. 2d 438 (1983). In that case, the court characterized the defendant's failure to clearly renew its motion for directed verdict at the close of the evidence as a mere "technical" problem being raised for the first time on appeal, and the court refused to allow a belated objection by plaintiff on this point to overcome substantial compliance with Rule 50 (683 F.2d at 294-295). The

present matter, of course, is characterized by a situation even further distant, in that petitioners herein never raised any Rule 50 problems until making their application *to this Court.*

B. State Law Issues

The remaining sections of petitioners' application do nothing more than raise state law issues which do not merit attention by this Court. Nevertheless, petitioners have made various misstatements in this context. Pursuant to Supreme Court Rule 15(2), and out of an abundance of caution, respondent feels it necessary to briefly address these misstatements.

Perhaps the most egregious misrepresentation made by petitioners is in section C.2. of their application, in which they assert that the Fifth Circuit was erroneous in ruling that "reasonably anticipated use" is a threshold element of a product liability plaintiff's case under Louisiana law, and that such is in conflict with other decisions of the Fifth Circuit itself and with Louisiana law in general. Neither aspect of this assertion is correct.

That "reasonably anticipated use" is indeed a threshold element of plaintiff's case has been confirmed by yet another panel of the Fifth Circuit, at least by implication, in *London v. MAC Corp. of America,* 44 F.3d 316 (5th Cir. 1995). In that case, the defendant-manufacturer's motion for judgment as a matter of law was upheld even though plaintiff had based his case on faulty design and failure to warn. Thus, the opinion of the Court of Appeals in the present matter is certainly in accord with other of its decisions —parenthetically, it is noted that petitioners fail to cite any opinions of the Fifth Circuit which they deem to be in disagreement.

Louisiana state court cases are likewise in accord with the foregoing. For example, the court in *Myers v. American Seating*

Co., 637 So. 2d 771 (La. App. 1st Cir. 1994), cited in the original Fifth Circuit opinion in this matter, upheld dismissal of the plaintiff's case based solely upon a finding that the use was not reasonably anticipated under the LPLA, *even though plaintiff had also proved the existence of "alternative designs"; see* 637 So. 2d at 778.

Notably, the only case cited by petitioners' in disagreement with the foregoing is *Delphen v. Dept. of Transp. & Dev.*, 657 So. 2d 328 (La. App. 4 Cir. 1995); instead of being "mainstream" Louisiana law as petitioners suggest, however, *Delphen* is actually the aberration. While *Delphen* is absolutely correct to the extent of its holding on the issue of "reasonable anticipated use" per se, it is incorrect if read to assert that a manufacturer may be held liable based solely by showing that its product contains an "unreasonably dangerous" characteristic. With this in mind, a short historical perspective is in order.

Prior to the LPLA, Louisiana products liability law was dependent upon a non-statutory scheme consisting solely of jurisprudence. The seminal case of modern products liability law in Louisiana was *Weber v. Fidelity & Casualty Co. of N.Y.*, 250 So. 2d 754 (La. 1971). In that case, the Louisiana Supreme Court specifically stated that the plaintiff must prove, *inter alia*, that the product was "unreasonably dangerous to normal use" (250 So. 2d at 755).

Subsequent cases, of course, were required to adopt this test, and it was generally held that a manufacturer could be held liable only if the plaintiff proved *all* the elements of his case, one of which was that the product was in normal use. *See Lanclos v. Rockwell Intern. Corp.*, 470 So. 2d 924, 929 (La. App. 3d Cir. 1985),citing *Weber, supra.*

In other words, since the beginning, Louisiana law has *always* required that the type of use being engaged in by the plaintiff be analyzed as a *threshold matter.* This has not changed under the LPLA — although petitioners enjoy citing the Kennedy article, Mr. Kennedy himself acknowledges that a plaintiff must prove that his damage "arose from a reasonably anticipated use of the product." J. Kennedy, *A Primer on the Louisiana Products Liability Act,* 49 La. L. Rev. 565, 583 (1989). Since 2800.54(D) specifically provides that "The claimant has the burden of proving the *elements* of Subsections A, B, and C of this Section" (emphasis added), it becomes undeniable that under the LPLA, the plaintiff must prove "reasonably anticipated use" *as a threshold matter* and that, absent doing so, he cannot prevail.

Returning to *Delphen* with the above in mind, it should first be noted that the court in that matter *incorrectly stated the content* of Section A of LSA R.S. 9:2800.54 — it is that error out of which the aberration arises, and upon which petitioners herein rely. At page 333 of the decision, the court in *Delphen* paraphrased the content of 2800.54 as follows:

> Plaintiffs must prove that a product is defective if it is unreasonably dangerous in its reasonably anticipated use or that there existed, at the time of the manufacture, a feasible alternative design capable of preventing the injury. [LSA R.S. 9:2800.54(A)].

In actuality, this passage contains at least one other error, pertaining to the concept of "feasibility" of an alternative design under Louisiana law; however, such is outside the scope of the issues under consideration herein.

The pertinent sections of the LPLA have been reproduced in the appendix to petitioners' writ application, so they are not reproduced herein — notably, however, in its *entirety,* section 2800.54(A), in contravention of *Delphen,* actually contains the following language:

> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product *unreasonably dangerous* when such damage *arose from a reasonably anticipated use* of the product by the claimant or another person or entity. (emphasis added)

Simply stated, *there is nothing in Section A which allows for any alternatives* — instead, the damage caused by any "unreasonably dangerous" characteristic must arise from a "reasonably anticipated use".

It is in section B of 2800.54 that descriptions of factors which can constitute "unreasonably dangerous" characteristics are provided — B(1) provides for problems in construction or composition; B(2) for problems in design; B(3) for problems related to warnings; and finally, B(4) pertains to problems with express warranties. Thus, according to the statutory scheme, one must first substitute from Section B, into Section A, the type of characteristic which is alleged to be "unreasonably dangerous" —however, according to Section A, *regardless of the nature of the unreasonably dangerous characteristic, any damage resulting therefrom must still "[arise] from a reasonably anticipated use".* This is no different than the 25-year-old requirement of *Weber, supra,* and its progeny, except that the LPLA utilizes the narrow, more stringent test ("reasonably anticipated use" rather than mere "normal use").

In view of the foregoing, perhaps *Delphen* should be read simply as an attempt by the court in that matter to show that the plaintiff had no basis upon which to prevail regardless of the arguments made. Conversely, however, to the extent that the analysis in *Delphen* is in conflict with 2800.54(A) — and a simple reading of that court's "version" of Section 2800.54(A) indeed shows obvious conflict — it must be seen as erroneous and not representative of Louisiana law.

Turning to the next point, petitioners state that the majority in the Fifth Circuit made "common use" a requirement of "reasonably anticipated use". This is simply incorrect — *nowhere in the original opinion is such a statement made or implied.* Indeed, it is clear that the majority engaged in discussion of what was or was not "common" in the context of this case only because that issue was asserted by the petitioners themselves and because the dissenting judge commented on such.

At note 6 of the original opinion, 70 F.3d 809, the majority stated, in pertinent part: "The dissent erroneously draws the conclusion from Ray's testimony that a negative lean is common". In the text of the opinion itself, also at page 809, the majority stated: *"Contrary to the Hunters' assertion,* the evidence does not allow a reasonable juror to find that leaning the pipes toward the mast was a common occurrence" (emphasis added).

The majority made it clear, however, in its denial of rehearing and denial of suggestion for rehearing en banc, that a finding of "commonness" is *not* a prerequisite to achieving the legal standard of "reasonable anticipated use". Therein, it was expressly stated as follows:

> Specifically, we conclude only that the manufacturer could not expect the *gross and unusual* "handling" of its product. We do not insist that under Louisiana law a manufacturer can "expect" only uses of a product that are common. (80 F.3d 136 at 137; emphasis added; citations omitted)

As a result, the petitioners' strategy in this regard, *i.e.*, to attempt to "bootstrap" their position by projecting their own faulty arguments as the supposed basis of the majority opinion, is meritless.

For the same reason, petitioners' assertion that the majority of the panel in the Fifth Circuit held that "*any* negligent use or misuse of a product cannot be a 'reasonably anticipated use' " (writ application, page 23) is also erroneous. As made clear above, the majority clearly held that this case was not one of ordinary, simple misuse, but rather one of "gross and unusual" handling of the product.

Next, although petitioners rely heavily upon the article written by Kennedy, they make only passing comment that "it may be true that a few intermediate state courts" have construed the term "reasonably anticipated use" more narrowly than the pre-LPLA term "normal use" (writ application, page 23). Of course, the Kennedy article is not law, but it is nonetheless interesting to note that Mr. Kennedy himself specifically recognizes this change and its significance (49 La. L. Rev 565 at 586). No court in Louisiana has held to the contrary, and indeed, the federal Fifth Circuit has recognized the distinction; *Lockart, supra*, 989 F.2d at 867 (citing, in note 6, the Kennedy article).

In this context, petitioners also cite *Daigle v. Audi of America, Inc.*, 598 So. 2d 1304 (La. App. 3d Cir. 1992), and point

out that the court in that matter referred to the Kennedy article and its analogies. Interestingly, however, petitioners fail to discuss the substance of *Daigle* itself. Indeed, both *Lockart* and *Daigle* were cited *by respondent* herein, KREMCO, *in support of its jury instruction pertaining to the issue of reasonable anticipated use,* as well as in its written post-trial motion for judgment as a matter of law. *Daigle* involved a plaintiff who, with the engine of his vehicle running, reached into an area that vehicle which could not be seen in an attempt to work on it. While it cannot be seriously contended that one is not making a "use" of his vehicle by choosing to attempt to perform maintenance or repairs on it, the court had no difficulty in holding that such was not a reasonably anticipated use, and recovery was thus denied.

Finally, petitioners assert that the result in the Fifth Circuit is contrary to *Bell v. Jet Wheel Blast, Div. of Ervin Ind.*, 462 So. 2d 166 (La. 1985). Again, however, their position is completely erroneous.

The Louisiana Supreme Court in *Bell* held that a plaintiff's ordinary contributory negligence could not be used to completely bar his recovery in a products liability case, and that such ordinary negligence, where applicable based upon policy considerations, must be considered only so far as to allow a reduction of recovery through the application of comparative fault. *Nowhere* is it stated in *Bell* that recovery could not be completely barred where the use of the product was found to be outside "normal use" (the standard existing at the time — the LPLA was not enacted until 1988). Additionally, the Court in *Bell* specifically stated that determinations concerning the application of comparative fault must be made on a case-by-case basis; 462 So. 2d at 172.

Subsequently, the courts of Louisiana have had no difficulty with making such decisions. The state court cases cited elsewhere herein (*Myers, Daigle,* and, on this issue only, *Delphen, supra*) which, notably, are post-*Bell* and cited in the Fifth Circuit's decision in this matter, all stand for the proposition that some uses of a product are so far outside a manufacturer's expectation that no recovery should be allowed — the Fifth Circuit held likewise, finding the use of respondent-Kremco's racking board to have been "gross and unusual".

It is respectfully submitted that if it is not a "reasonably anticipated use" to step on the back edge of the seat of a folding chair instead of the front (as in *Myers*), to reach under the hood of an automobile into an unseen area (as in *Daigle*), and to ride a precision bicycle knowing that it has a wobbly wheel while admitting lack of knowledge of how to mount it (as in *Delphen*), then the present situation, in which hundreds of thousands of pounds of oilfield pipe were allowed to continue to lean against gravity as well as common sense and industry practice, is certainly in accord. Any argument to the contrary is simply absurd.

Based upon the foregoing, the majority in the Fifth Circuit clearly analyzed the latest Louisiana state court jurisprudence and held in conformity therewith. In any event, however, such matters are nothing more than state law issues which have no overriding national or federal significance, and which should not thus warrant this Court's attention.

CONCLUSION

Petitioners' writ application to this Honorable Court presents a classic example of a quest for form over substance. Their endless citations of the *Erie* doctrine add no force to their position —reduced to essentials, petitioners hope to have this Court review state law issues under the guise of an "admission ticket" through which they assert the purely technical violation of a federal procedural rule.

The primary purpose of FRCP 50 is to prevent "ambush". Not only did petitioners never raise a Rule 50 problem prior to their writ application in this Court, their behavior and actions in the lower courts clearly indicate that no such problem ever existed—as a result, it appears that, in actuality, respondents are the ones who are is being "ambushed".

The petitioners' conduct goes far beyond merely remaining silent on these issues, although silence alone would constitute a waiver of their right to now protest. The transcript, and the events described herein, taken in context, clearly reveal that petitioners were at all times aware of the reasons underlying respondents' motions for judgment as a matter of law. In any event, however, petitioners have forfeited their right to now complain.

In the trial itself, petitioners asserted in their own motion for judgment as a matter of law that "reasonably anticipated use" had been firmly established in their favor and should thus not be within the province of the jury's verdict. Clearly, therefore, they felt that no further proof was needed.

After trial, respondents filed a written motion for judgment as a matter of law, again raising the issue of reasonably anticipated use and other issues. Petitioners submitted a written response to same and never raised a Rule 50 violation; instead,

they argued the merits of the motion and, as had been done during trial, the Court denied same.

In the Fifth Circuit, petitioners not only raised no Rule 50 problem, they admitted the contrary, *i.e.*, that respondent had made a motion for judgment as a matter of law at the close of their case, and again at the close of all the evidence, the underlying reasons for which were that the accident did not occur during a reasonably anticipated use and that the product was not otherwise unreasonably dangerous. Clearly, therefore, petitioners were at all times aware of the reasons underlying those motions.

In their appellate brief to the Fifth Circuit, petitioners asserted that the standard of appellate review in this matter should be that which is commonly referred to as "sufficiency of the evidence" — that standard had indeed been applied by the majority in the Fifth Circuit, utilizing case citations provided by petitioners. Thus, not only did petitioners not raise a Rule 50 problem, but further, they themselves urged the very standard of review which they now assert should be considered improper.

Even in this Court, petitioners have never stated or otherwise indicated that they were "ambushed". They have not requested a new trial, or even suggested that such would be needed to "cure any defects" in their proof — notably, the vast majority of proof on the issue of "reasonably anticipated use" came from their own witnesses.

Nothing further needs to be stated with respect to petitioners' arguments concerning Louisiana law, except to reiterate that such are merely state law issues which have no overriding federal or national significance. For all of the foregoing reasons, petitioners' writ application should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT RULES

FEDERAL RULES OF APPELLATE PROCEDURE 28(a)(3) and 28 (a)(6):

Rule 28. Briefs

(a) Appellant's Brief. — The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * *

(3) A statement of the issues presented for review.

* * *

(6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

* * *

FEDERAL RULE OF CIVIL PROCEDURE 50:

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

Appendix A

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate

court concludes that the trial erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

SUPREME COURT RULE 10

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at page 528]

THAT, MR. ROYER, IS THE PLAINTIFF'S EVIDENCE COMPLETE?

MR. ROYER: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. RANEY: YOUR HONOR, MAY WE HAVE A BRIEF CONFERENCE WITH YOU?

THE COURT: ALL RIGHT.

(DISCUSSION OFF THE RECORD)

THE COURT: LADIES AND GENTLEMEN, WE'RE GONNA TAKE A RECESS NOW. THERE MAY BE SOME THINGS THAT WE MIGHT BE ABLE TO WORK OUT TO SAVE SOME TIME THROUGHOUT THE PRESENTATION OF THE DEFENDANT'S EVIDENCE, SO WE'LL TAKE A RECESS AT THIS TIME.

(RECESS)

(JURY ABSENT)

THE COURT: THANK YOU, PLEASE BE SEATED. WHY DON'T WE GO AHEAD AND TAKE UP THIS EXHIBIT 23.1 BEFORE IT GETS FORGOTTEN? WHAT IS THE NATURE OF THE OBJECTION THE DEFENSE HAS TO THAT EXHIBIT?

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MR. RANEY: YOUR HONOR, IT'S DATED PAST THE TIME THAT THIS RACKING BOARD WAS MANUFACTURED, AT LEAST THE [529] FIRST PAGE OF IT IS THAT SHOWS THE MAIN FRAME AND SUBSTANCE OF THE RACKING BOARD.

THE COURT: MR. ROYER, DOES IT HAVE ANY RELEVANCE OTHER THAN AS TO THE ADEQUACY OF THE DESIGN?

MR. ROYER: YOUR HONOR, YES. OF COURSE, IT DEFINITELY WOULD RELATE TO THE ISSUE OF WARNINGS. THE REASON THAT DEFENSE COUNSEL I'M SURE IS STRENUOUSLY OBJECTING SO MUCH IS THAT THERE'S BEEN TESTIMONY THAT MR. KNOLL TOOK HIS DESIGN SOMEWHAT FROM THE IDECO RACKING BOARD AND THIS HAPPENS TO BE A BLUEPRINT OF AN IDECO RACKING BOARD, AND THE STEP PLATFORMS THAT WE SEE THERE IS SUBSTANTIALLY CLOSER TO THE DIVING BOARD AND WHEN YOU LOOK AT THE FINGERS THAT GO IN THIS RACKING BOARD THERE'S ONLY ABOUT SIX AND FIVE-EIGHTHS INCHES BETWEEN THE END OF THE FINGERS AND THE PLATFORM, ALTHOUGH IT DOESN'T SHOW IT ON FRONT PAGE. SO CLEARLY THEY'RE MUCH CONCERNED I WOULD THINK FOR THAT REASON ABOUT THIS BLUEPRINT GOING IN, BUT IT'S CLEARLY RELEVANT AND MATERIAL TO THIS MATTER IN WHETHER OR NOT THEY SHOULD HAVE — LET'S ASSUME THAT MAYBE THEY COULDN'T HAVE POSSIBLY KNOWN ABOUT THIS DESIGN PRIOR TO AUGUST OF 1981, BUT THEY COULD HAVE CERTAINLY KNOWN ABOUT IT AS OF AUGUST

1981 AND THEY COULD HAVE EASILY AT THAT POINT IN TIME TAKEN SOME MEASURES AS A RESPONSIBLE MANUFACTURER TO PROVIDE WARNINGS, INSTRUCTIONS, CAUTIONS OR RECALL OR SOMETHING TO MAKE THEIR RACKING BOARD SAFER FOR [530] THOSE IN THE INDUSTRY USING THAT RACKING BOARD, AND I WOULD NOTE THAT THE OTHER PARTS OF THE DIAGRAM — THIS IS OBVIOUSLY AN UPDATED VERSION OF SIMPLY ONE EARLIER, BUT THE PARTS OF IT, THE SECOND PAGE THAT GOES TO THIS DIAGRAM, OKAY, IS DATED FEBRUARY 26 OF 1980. SO I THINK IF YOU LOOK AT THE EVIDENCE — AND THE OTHER DRAWING IS DATED MAY 1 OF 1980, THEN THE OTHER ONE IS DATED APRIL 24 OF '80 — CLEARLY THERE'S A QUESTION OF FACT WITH RESPECT TO WHETHER THIS PARTICULAR DESIGN ANYWAY WAS AVAILABLE PRIOR TO THE TIME THAT OUR RIG WAS MANUFACTURED.

THE COURT: WELL, WHAT EVIDENCE DO YOU HAVE THAT WOULD SUPPORT THAT OTHER THAN THE DRAWINGS ATTACHED TO THE BACK? I MEAN, IS THERE SOME WITNESS WHO HAS OFFERED SOME TESTIMONY ABOUT THIS DRAWING?

MR. ROYER: YES, YOUR HONOR, MR. JACK REEVE WHOM THE DEFENDANTS ARE FIXING TO INTRODUCE IN ITS ENTIRETY HIS DEPOSITION IDENTIFIES AND DISCUSSES THIS BLUEPRINT, AND IN THE SUBPOENA WE ASKED FOR — TO MR. REEVE — ALL THE ALTERNATIVE DESIGNS THAT WERE AVAILABLE PRIOR TO THE MANUFACTURE OF THIS RIG AND HE'S THE ONE WHO PRODUCED THIS SET OF BLUEPRINTS.

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THE COURT: UNFORTUNATELY, THAT IS NOT IN EVIDENCE AT THIS TIME. I CAN'T RELY ON WHAT MAY COME IN THE FUTURE. BUT IS THERE ANY WARNING THAT THE PLAINTIFF IS ARGUING SHOULD HAVE BEEN ON THIS BESIDES A WARNING ABOUT [531] NOT TYING INTO THE BACK HANDRAIL? I'VE NOT HEARD ANYTHING OTHER THAN THAT.

MR. ROYER: WELL, YOUR HONOR, YOU HEARD DR. SHELTON STATE HE HAD THREE CRITICISMS OF THIS RACKING BOARD AND ONE OF THE THREE CRITICISMS THAT HE HAD OF THIS RACKING BOARD WAS THE EXCESSIVE SPACE BETWEEN THE END OF THE FINGERS AND THOSE WALKWAYS, SO —

THE COURT: DOES THAT HAVE ANYTHING TO DO WITH THE ACCIDENT?

MR. ROYER: WELL, YOUR HONOR, IT DOES IN THE FACT THAT IF THE PIPE IS TRAPPED BACK WITHIN THAT RACKING BOARD, THAT DERRICKMAN — ASSUMING THAT HANDRAIL GIVES, IT'S ONLY GOING TO FALL A SHORT DISTANCE, OKAY, AND BE TRAPPED WITHIN THAT RACKING BOARD AND IS NOT GOING TO SWARM AS OCCURRED IN THIS CASE, AND THE DERRICKMAN IS NOT GOING TO FALL COMPLETELY OUT OF THE RACKING BOARD INTO THE MAST AND BE CRUSHED BY THE PIPE.

THE COURT: I DON'T RECALL ANY WITNESS TESTIFYING THAT THE ACCIDENT COULD HAVE BEEN AVOIDED BY HAVING THAT PLATFORM CLOSER TO THE END OF THE FINGERS. ARE YOU REPRESENTING THAT THE WITNESSES HAVE SO TESTIFIED?

MR. ROYER: NO, YOUR HONOR, I'M NOT SAYING ANYBODY HAS DIRECTLY STATED THAT, NO, I AM NOT REPRESENTING THAT TO THE COURT AT ALL, NO.

THE COURT: WELL, I THINK THAT ON THE ISSUE OF [532] DESIGN IT'S CLEAR THAT THE EVIDENCE NEEDS TO HAVE EXISTED BEFORE THE SUBJECT PRODUCT WAS MANUFACTURED.

MR. ROYER: YOUR HONOR, WHY DON'T WE JUST WITHDRAW THE INTRODUCTION OF THIS EXHIBIT AT THIS POINT IN TIME AND SEE SHOULD IT NEED TO BE PRESENTED AT SOME LATER POINT IN TIME, AND THAT WILL SAVE THE COURT —

THE COURT: ALL RIGHT, THAT'S FINE.

MR. ROYER: — FROM HAVING TO RULE AND WE WILL —

THE COURT: I'LL CONSIDER IT WITHDRAWN.

MR. ROYER: THANK YOU.

THE COURT: YOU HAD MADE REFERENCE, MR. RANEY, TO SOME MOTION, I BELIEVE, THAT YOU WANTED TO MAKE AT THE NEXT RECESS. THIS IS THE NEXT RECESS.

MR. RANEY: YES, SIR, WE WOULD MOVE TO DISMISS AT THIS TIME ON A DIRECTED VERDICT, YOUR HONOR.

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THE COURT: ALL RIGHT, I'LL CONSIDER THAT MOTION AS HAVING BEEN MADE AND DENIED, AND WE WILL BE IN RECESS FOR THE NEXT 20 MINUTES TO ALLOW YOU TO PREPARE FOR YOUR CASE IN CHIEF.

MR. RANEY: THANK YOU.

(RECESS)

(JURY ABSENT)

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[765] JUST HAVEN'T GOTTEN TO THAT POINT SO FAR, BUT THE PLAINTIFFS . . . PLAINTIFF'S PROPOSED JURY INSTRUCTION, YOUR HONOR — I TAKE BACK THAT NUMBER. WE'LL MAKE IT 40, NO. 40. SINCE I'VE GOT 4, I'LL JUST PUT A ZERO ON IT, OR YOU WANT ME TO MAKE IT SOME OTHER NUMBER CLOSER?

THE COURT: IT DOESN'T MATTER TO ME.

MR. ROYER: OKAY, PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 40, AND IT'S A DISCUSSION OF THE LAW AS WELL, BUT BASICALLY IT IS OUR POSITION THAT IF THE JURY IS, THIS INSTRUCTION IS GOING TO BE SUBMITTED TO THE JURY, FIRST AND FOREMOST WE BELIEVE THAT IT'S A MATTER OF LAW FOR YOUR HONOR THAT THERE ARE NO FACTS OVER WHICH REASONABLE MINDS COULD DIFFER THAT THEY WERE INVOLVED IN A REASONABLY ANTICIPATED USE OF THIS PRODUCT AT THE TIME THAT MR. HUNTER WAS KILLED; THEREFORE, IT IS

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OUR POSITION THAT THE REASONABLY ANTICIPATED USE ISSUE SHOULD NOT BE TENDERED TO THE JURY, AND I'LL CITE TO YOUR HONOR — DEFENDANTS HAD CITED LOCKART VERSUS KOLB STEEL CONSTRUCTION LIMITED, MACHINERY DIVISION, AND THEY REFERRED TO AN ARTICLE BY JOHN KENNEDY, A DRAFTER OF THE LOUISIANA PRODUCT'S LIABILITY ACT. THAT CASE IS NOT AT ALL SIMILAR TO THIS CASE, ENTIRELY DIFFERENT. CLEARLY MR. HUNTER WAS USING THIS RACKING BOARD TO RACK PIPE; THAT'S ITS INTENDED USE, AND THE FACT THAT SOME OF THAT PIPE WAS LEANING TOWARD THE MAST HAS CERTAINLY GOT TO BE

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[857] A. (WITNESS COMPLIES).

Q. THANK YOU, SIR. MR. PRINCE, CAN YOU TELL ME HOW OFTEN WHEN YOU'RE RACKING THREE AND A HALF INCH E.U.E. N-80 TUBING THAT WEIGHS 12.95 POUNDS PER FOOT THAT IT'S GOING TO BE GETTING TO THE POINT THAT IT STARTS LEANING BACK TOWARDS THE MAST?

A. ALMOST EVERY TIME.

MR. RANEY: YOUR HONOR, I HAVE TO OBJECT AGAIN. THIS IS SOMETHING THAT COULD HAVE BEEN DONE — IT IS NOT REBUTTAL.

THE COURT: WELL, I DON'T —

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MR. ROYER: YOUR HONOR, THE DEFENDANTS HAVE BEEN — THAT'S ALL THEIR CASE HAS BEEN ON DEFENSE, HAS BEEN THE LEAN OF THE PIPE.

THE COURT: I DON'T WANT TO GO BACK THROUGH THIS WITNESS' AND ALL THE OTHER WITNESSES' TESTIMONY AT THIS POINT. IF THERE'S SOMETHING THAT CAME UP FOR THE FIRST TIME ON THEIR CASE IN CHIEF THAT WASN'T EXPLORED BY YOU WHEN THIS WITNESS TESTIFIED PREVIOUSLY, THEN WE CAN GO INTO THAT, BUT I'LL SUSTAIN THE OBJECTION AS TO THIS QUESTION.

MR. ROYER: I DON'T THINK WE ADDRESSED THIS PARTICULAR QUESTION WITH HIM THE FIRST TIME, THOUGH, YOUR HONOR.

THE COURT: WELL, IF THIS SUBJECT MATTER WAS

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[891] CLOSING ARGUMENTS. WE'RE GOING TO NEED TO ASK YOU TO WAIT WHILE WE FINALIZE EVERYTHING NOW IN THE JURY ROOM, BUT IT WON'T BE MUCH LONGER UNTIL WE CAN HAVE YOU BACK IN HERE FOR THAT. AT THIS TIME WE'LL EXCUSE THE JURY.

(JURY EXITS)

THE COURT: THANK YOU, PLEASE BE SEATED.

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MR. RANEY: YOUR HONOR, JUST A COUPLE OF MATTERS BRIEFLY, IF I MAY.

THE COURT: YES.

MR. RANEY: FIRST OF ALL, SINCE YOU ALLOWED ARGUMENT ON MR. PERRAULT'S TESTIMONY, I PRESUME THAT THAT WAS REGISTERED AS AN OBJECTION BY ME IN THE RECORD?

THE COURT: I CONSIDERED IT AS SUCH.

MR. RANEY: THANK YOU. AND WE WOULD RE-URGE OUR MOTION AT THIS TIME FOR DISMISSAL.

THE COURT: THE MOTION FOR JUDGMENT AS A MATTER OF LAW WILL BE NOTED AND DENIED AT THIS TIME.

MR. POSEY: YOUR HONOR, WE WOULD ALSO LIKE TO MOVE FOR A JUDGMENT AS A MATTER OF LAW AS TO THE COMPARATIVE FAULT OF CLAUDE HUNTER FOR THE REASONS EARLIER STATED BY MR. ROYER, AND I WON'T GO OVER THOSE AGAIN AT THIS TIME. AND, ALSO, AS TO THE ISSUE OF REASONABLY ANTICIPATED USE, IT'S OUR CONTENTION STILL THAT THAT IS [892] NOT WITHIN WHAT IS CONTEMPLATED BY THE LAW. THE FACTS OF THIS CASE CLEARLY CONSTITUTE A REASONABLY ANTICIPATED USE OF THIS PRODUCT AND, THEREFORE, THAT PARTICULAR INSTRUCTION SHOULD GO TO THE JURY.

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THE COURT: I UNDERSTAND BOTH OF THOSE ARGUMENTS AND THEY ARE NOTED. HOWEVER, THE MOTION WILL BE DENIED IN THOSE RESPECTS AS WELL. AS SOON AS WE HAVE COMPLETED THE JURY INSTRUCTIONS, WHICH SHOULD ONLY TAKE A FEW MORE MINUTES, WE'LL BE PREPARED TO GIVE THOSE TO THE JURY AND IMMEDIATELY AFTER THAT WE'LL GO INTO THE CLOSING ARGUMENTS. HOW MUCH TIME WOULD YOU REQUEST FOR THAT, MR. ROYER?

MR. ROYER: YOUR HONOR, WE WOULD REQUEST 30 MINUTES AND WE WOULD REQUEST THAT MR. POSEY BE ALLOWED TO PRESENT THE INITIAL CLOSING ARGUMENT 20 MINUTES AND RESERVE 10 MINUTES AND I WILL TAKE THE REBUTTAL.

THE COURT: ALL RIGHT. AND, MR. RANEY, YOU'LL BE ALLOWED 30 MINUTES AS WELL. DO YOU HAVE ANY OBJECTION TO THAT? —

MR. RANEY: I THINK I CAN DO IT IN THAT TIME, YOUR HONOR.

THE COURT: ALL RIGHT. MR. POSEY, DO YOU WANT TO HAVE ANY INDICATION FROM ME AT SOME POINT BEFORE THE END OF THE 20 MINUTES?

MR. POSEY: YES, PLEASE, IF YOU COULD LET ME

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